



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 13, 2003

Ms. Cynthia Villarreal-Reyna
Staff Attorney
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2003-8173

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191009.

The Texas Department of Insurance (the "department") received a request for information pertaining to American Chambers Life Insurance Company. You inform us that some of the requested information is being withheld from disclosure in accordance with previous determinations issued to the department in Open Records Letter Nos. 2001-4777 (2001) (identifying information regarding enrollees in health plans) and 99-1264 (1999) (information obtained during course of examination of entities regulated by department). *See also* Open Records Decision No. 673 at 7-9 (2001) (delineating elements of second type of previous determination under Gov't Code § 552.301(a)).¹ You claim that some of the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.130, and 552.137 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.²

¹In addition to the information that you have marked for withholding, we have marked other information that the department also must withhold in accordance with Open Records Letter No. 2001-4777 (2001).

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Some of the submitted information is part of a completed investigation made of, for, or by the department. This information must be released under section 552.022(a)(1) unless it is expressly made confidential under other law or excepted from disclosure under section 552.108 of the Government Code.³ The department raises sections 552.107 and 552.111 of the Government Code with regard to the information that is encompassed by section 552.022(a)(1). We note, however, that these sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived.⁴ As such, sections 552.107 and 552.111 are not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any of the information that is encompassed by section 552.022 under sections 552.107 or 552.111.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The department asserts the attorney-client and attorney work product privileges with regard to the information that is encompassed by section 552.022. The attorney-client privilege is found at Texas Rule of Evidence 503, and the attorney work product privilege is found at Texas Rule of Civil Procedure 192.5. Therefore, we will consider whether the department may withhold the information that is encompassed by section 552.022 under rules 503 and 192.5.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

³The department does not seek to withhold any of the information encompassed by section 552.022 under section 552.108 of the Government Code.

⁴*See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege may be waived), 676 at 10-11 (2002) (attorney-client privilege may be waived), 665 at 2 n.5 (discretionary exceptions generally), 630 at 4 (1994) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 may be waived).

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You inform us that some of the information that is encompassed by section 552.022 consists of communications between attorneys for and client representatives of the department. You state that these communications were not intended to be disclosed to third persons other than those to whom disclosure was made in furtherance of the rendition of professional legal services to the department or those reasonably necessary for the transmission of the communications. You also state that the department has maintained the confidentiality of these attorney-client communications. Based on your representations, we conclude that some

of the information that is subject to section 552.022 is confidential under Texas Rule of Evidence 503. We have marked the information that the department may withhold under rule 503.

Texas Rule of Civil Procedure 192.5 enacts the attorney work product privilege. For the purpose of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.* The first element of the test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) that a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) that the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second element of the test requires the governmental body to show that the documents at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both elements of the work product test is confidential under rule 192.5, provided that the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You indicate that the remaining information that is subject to section 552.022 is part of an investigative file that was created in anticipation of litigation. You state that a reasonable person would have concluded that there was a substantial chance of litigation and that the investigation was conducted for the purpose of preparing for the litigation. You contend that the litigation file, the attorneys' notes and other contents of the file, and the organization of the file reveal the thought processes, conclusions, and legal theories of attorneys for the department and attorneys' representatives. Based on your representations, we conclude that the remaining information that is subject to section 552.022 qualifies as core attorney work product and is confidential under Texas Rule of Civil Procedure 192.5. Therefore, the department may withhold that information under rule 192.5.

Next, we address your claims with regard to the rest of the submitted information. You contend that some of this information is confidential under section 552.101 of the Government Code. Section 552.101 excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information that other statutes make confidential. You assert that some of the remaining information is confidential under the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. The MPA governs the disclosure of medical records. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). We also have determined that the MPA ordinarily encompasses only records created either by a physician or by someone acting under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). However, when a file is created as the result of a hospital stay, we have concluded that all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician, created or maintained by a physician, for purposes of the MPA. *See* Open Records Decision No. 546 (1990). Medical records must be released upon signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the submitted information that is subject to the MPA. The department must not release that information unless the MPA permits the department to do so. *See* Open Records Decision No. 598 (1991).

You also raise section 552.101 in conjunction with the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private). We also have determined that certain kinds of personal financial information are protected by common-law privacy under section 552.101. In prior decisions, we have concluded that personal financial information relating only to an individual ordinarily satisfies the first part of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See, e.g., Open Records Decision Nos. 545 at 4 (1990) (“In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities”), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public’s interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We have marked the submitted information that the department must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

The department also raises section 552.130 of the Government Code. Section 552.130 excepts from public disclosure information that relates to “a motor vehicle operator’s or driver’s license or permit issued by an agency of this state[.]” Gov’t Code § 552.130(a)(1). Section 552.130(a)(1) encompasses information that relates to a Texas driver’s license. We have marked Texas driver’s license information that the department must withhold under section 552.130.

Lastly, we address your claim under section 552.137 of the Government Code. As amended by the 78th Legislature, section 552.137 provides as follows:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. You have marked an e-mail address that you claim is confidential under section 552.137. You inform us that the department has not received affirmative consent to the disclosure of this e-mail address. We agree that the department must withhold the marked e-mail address under section 552.137 of the Government Code.

In summary: (1) the department must withhold the information that is encompassed by the previous determinations issued in Open Records Letter Nos. 2001-4777 (2001) and 99-1264 (1999); (2) the department may withhold the submitted information that is confidential under

Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5; (3) the department must not release the information that is confidential under the MPA unless the MPA permits the department to do so; (4) the department must withhold the information that is confidential under section 552.101 of the Government Code in conjunction with common-law privacy; and (5) the department also must withhold the Texas driver's license information that is encompassed by section 552.130 and the e-mail address that is confidential under section 552.137. The rest of the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

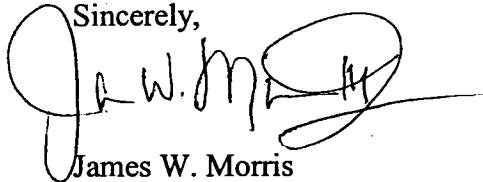
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris", with a large, stylized initial "J" and a long, sweeping underline.

James W. Morris
Assistant Attorney General
Open Records Division

JWM/lmt

Ref: ID# 191009

Enc. Submitted documents

cc: Mr. Larry D. Reese
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(w/o enclosures)